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In the Supreme Court of the United States

October Term, 1955.

DAVID H. MITCHELL, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Eighth Circuit.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
620 R. A. Long Building,
Kansas City, Missouri,
HARLOW B. KING,
1009 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY MO

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to the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause, affirming the judgment of the United States District Court for the Western District of Missouri.

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Opinions Below.

The District Court wrote no opinion. The original opinion of the Court of Appeals (*Mitchell* v. *United States*, R. 122) is reported in 208 F. 2d 854. Judgment pursuant to said opinion was vacated by *per curiam* decision of this Court (*Mitchell* v. *United States*, O. T. 1953), reported in 348 U. S. 905. The second opinion of the Court of Appeals rendered on May 3, 1955, is printed in the Appendix, *infra*, pp. 21-25, and has been reported in 221 F. 2d 554.

Jurisdiction.

The second judgment of the Court of Appeals was entered on May 3, 1955 (Appendix, *infra*, p. 25). Petition for Rehearing and Request for Consideration by the Court *en banc*, filed May 19, 1955, was overruled May 31, 1955. An order staying mandate was entered June 6, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

Questions Presented.

(1) Did Court of Appeals in its second opinion comply with direction of this Court to consider case in light of *Holland* v. *United States*, 348 U. S. 121; or did Court of Appeals violate said direction and merely repeat the procedural objections to appellate review contained in its first opinion, which objections were not related to said *Holland* decision and were known and passed over by this Court when judgment was vacated and rehearing ordered with said restrictive direction?

(2) Did evidence meet this Court's requirement that net worth convictions must be supported by proof of likely taxable source of net worth increases, from which the jury could reasonably find that the net worth increases sprang;

or was there total failure to prove such taxable source, and actual disproof by Government of theoretically possible taxable sources?

(3) Did instructions meet this Court's requirement for summary of nature of net worth method, assumptions on which it rests, and inferences available both for and against the accused; or did instructions erroneously permit automatic inference of unreported taxable income from proof of net worth increases, and fail to submit to jury necessity of finding taxable source of net worth increases?

(4) Did Court of Appeals erroneously construe Rule 52, Federal Rules of Criminal Procedure, in establishing rule of decision that failure to object at trial is absolute bar to considering failure of proof and plainly defective instructions, and in disregarding failure of net worth proof because there were speculative alternative factual grounds for the jury's verdict?

(5) Did Court of Appeals err in refusing to consider failure of proof and defective instructions, on theory counsel should have objected at trial, when trial complied with law then existing, but clearly violated principles subsequently announced by this Court?

(6) In prosecution under indictment citing Sec. 145(b) of the 1939 Internal Revenue Code, did trial court err in failing to submit to jury the alternative of conviction of lesser offense under Sec. 3616(a) of said Code?

(7) In net worth prosecution, were taxpayer's financial statements based on market values $150,000 in excess of cost admissible to corroborate Government's closing net worth based on cost?

(8) Did trial court err in instructions computing taxpayer's income by comparing beginning net worth based on cost with ending net worth based on market values

$150,000 in excess of cost, and stating that said purported but unrealized income was evidence of willful tax evasion?

(9) Should conviction be reversed for plain errors at trial, including (a) reference to defendant's failure to testify; (b) erroneous argument to jury that court had ruled evidence favorable to defendant was "not the facts and the truth"; and (c) erroneous instruction that defendant's evidence was legally "negative testimony" which was "weak testimony"?

Statutes and Rules Involved.

26 U. S. C., Sec. 145(b), Internal Revenue Code of 1939, provides:

Failure to collect and pay over tax, or attempt to defeat or evade tax—Any person required under this chapter to collect, account for, and pay any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. 53 Stat. 62.

26 U. S. C., Sec. 3616(a), Internal Revenue Code of 1939, provides:

Whenever any person—

False returns—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not

exceeding one year, or both, at the discretion of the Court, with costs of prosecution. 53 Stat. 440.

Rule 31(c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 52, Federal Rules of Criminal Procedure, provides:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

Statement.

Petitioner was convicted of income tax evasion for the years 1945-1948, under four counts of a six count indictment charging violations of Section 145(b) of the 1939 Internal Revenue Code, 26 U. S. C. He was sentenced to concurrent imprisonment for four years on each of the first three counts, and was fined $20,000 (R. 1-4, 79-82).

The Government stated that prosecution was "primarily" based on the net worth theory. (Supplemental Record on Rehearing—S. R. O. R. 2, 8.) Under said theory, unreported income approximating $32,000 per year was claimed, which was roughly equivalent to the reported income (R. 9). The Government made no effort at trial to allocate the net worth increases to taxable sources, disclosed or undisclosed, or to disprove nontaxable sources.

The Revenue Agents who conducted the investigation and prepared the net worth statement testified that they

did not know the source of the net worth increases (R. 26-28). Allegedly corroborative evidence in the form of financial statements prepared by petitioner did not tend to prove taxable rather than nontaxable source.

The jury was informed by the Government that increased assets "would normally represent income" (R. 5), that "expenditures, also, would normally amount to evidence of income received during that year" (S. R. O. R. 1), and that increased net worth "would naturally reflect the income received since it is only, unless otherwise explained, by income received that you will have increase in the net worth of the defendant" (S. R. O. R. 8). The court's instructions on the net worth method also treated net worth increase as automatically synonomous with income, without requiring findings of taxable source (R. 71). Petitioner's first objection to the aforesaid presumption of taxable source was made in the Court of Appeals (Appellant's Correction, Supplemental Record, Statement, Brief and Argument, 37-40) on the stated theory that trial of this point was consistent with the then-existing appellate authorities, which could only be corrected by the appellate courts (*ibid.* 46).

Petitioner likewise introduced no evidence as to the source of the net worth increases for 1945-1948; he did accept the burden of explanation for 1949-1950 (R. 52-55), and the jury acquitted petitioner for the latter years.

Financial statements made in 1949 and 1950, prepared by petitioner to obtain bank loans, and containing market values as of those dates more than $150,000 in excess of cost, were admitted in evidence over objection, and were commented on by Government counsel and the trial court as corroborating the Government's closing net worth statements, based on cost valuations (R. 9, 11-14, 29-41, 63, 71-72, 121). The court's instructions calculated unre-

ported income for the indictment period by treating said $150,000 of unrealized appreciation as income, and suggested that the financial statements be considered as evidence of willful evasion (R. 71-72).

In addition to the net worth prosecution, a subordinate theory of prosecution was based on items of specific income allegedly unreported, averaging about one-fourth of the reported income, which also was one-fourth of the alleged income calculated by the net worth method (R. 22-25). In support of the specific omissions theory, the Government undertook to prove the exact amount of tavern income allegedly received by petitioner, and the exact amount of income from specified real estate (R. 16-21, 104-106).

A more detailed statement is contained in the petition for certiorari in *Mitchell* v. *United States,* No. 622, O. T., 1953, 4-10, which petitioner adopts herein by reference.

Reasons for Granting the Writ.

(1) *Violation of This Court's Order.*—Question (1), *supra.*

This second petition for certiorari is made necessary by the violation below of the order and direction of this Court, January 10, 1955, that this case be considered "in the light of *Holland* v. *United States,* 348 U. S. 121 • • •." *Mitchell* v. *United States,* 348 U. S. 905. On being informed of said decision on January 24, 1955, the Court of Appeals scheduled rehearing, and properly limited argument "to questions of alleged errors of the trial court in its ruling with reference to the admissibility or sufficiency of the evidence admitted or rejected as proof of net income under the so-called net worth method and to any alleged error in the instructions of the court in relation to such net worth method." In its opinion dated May 3,

1955, however, the court below abandoned the subjects set for argument, ignored the content of the *Holland* decision and the mutual subject matter indicated by its own order, and cited *Holland* merely by way of introduction and conclusion to its opinion. Appendix, p. 22, 221 F. 2d 554.

The second opinion by the court below indicates reliance on procedural objections to a review which are foreign to *Holland,* to the restrictive direction of this Court, and to the order of January 24. The opinion is a mere reiteration of the original opinion in this case. *Mitchell* v. *United States,* 208 F. 2d 854, R. 122. Aside from flagrantly violating the explicit direction of this Court in a manner calling for the exercise of this Court's power of supervision, reliance on said procedural objections is wholly unwarranted for reasons discussed under topic (3), *infra.* Similar reasoning was presented in petitioner's successful petition for rehearing in this Court (No. 622, O. T., 1953, pp. 8-10), which induced the Court to vacate the judgment below and its own denial of certiorari, and the opinion of the court below in effect constitutes a dissenting opinion from the ultimate action of this Court rather than proper compliance with explicit directions from superior authority.

Conflict between circuits in the application of this Court's direction is found in *Watts* v. *United States,* C. A. 10, 220 F. 2d 483, where, despite procedural objections much more serious than in the instant case, the court reviewed the evidence as to the source of the net worth increases in light of the standards set by *Holland.*

(2) *Conflict With Holland Principles*—Questions (2) and (3) *supra.*

(a) *Relative to Proof of Taxable Source for Net Worth Increases.*

The only justification for sanctioning the net worth proof in the case at bar would be an analysis squaring the evidence at trial with the evidence required by *Holland*. Petitioner's brief below demonstrated (pages 12-15) that this cannot be done. The Government's brief merely claimed proof of "definite sources of income" (page 9) and that "defendant was engaged either actively or on a percentage basis in numerous bars, hotels, etc." (page 8). The Government avoided stating that said bars, or the real estate, or any undisclosed sources of income, explain the alleged net worth increases. The vagueness of the Government's position is tacitly admitted by the protest in the brief (page 7) that it is really too much to ask proof of a "definite" or "actual" source of the net worth increases. If the Government is uncertain as to source, is it possible to contend that the evidence is sufficient so that "the jury could find (whence) the net worth increases sprang," as required in *Holland* (l. c. 137)? To advance from an uncertain prosecution to a jury finding of taxable source beyond a reasonable doubt would require an act of faith rather than reason, or an inference (contrary to the teaching of *Holland*) automatically attributing unexplained net worth increases to currently taxable income.

Contrasting the evidence of source in *Holland* and *Mitchell* is decisive. The "Holland House" was carefully proven to be "capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases" (l. c. 137-138). It was further shown that cash register receipts used for personal and business expenses were unrecorded in an amount exceeding $12,500 for the relevant year (l. c. 137). In said case, there was no limit to unrecorded receipts, other than the proven capacity of the business. In *Mitchell*, however, the Government made no effort to prove the capacity of petitioner's properties such as would cast grave doubt on

the reported income, nor was there proof, as in *Holland*, that the properties were producing unlimited amounts of unrecorded income. Exactly contrary to *Holland*, the Government's witnesses in *Mitchell* testified that *all* tavern receipts were recorded in "day books" (S. R. O. R. 2-6), that the day books were in basic agreement with the tax returns (R. 27), and specified petitioner's share in said receipts (S. R. O. R. 2-4). If the Government's evidence is to be believed, petitioner's tavern income was specifically proven and thereby limited so that it could not have been the source of the unexplained net worth increases.

There is likewise no reason to believe that petitioner's real estate produced income sufficient to explain the net worth increases. The Government has neither specified nor asserted the contrary. Two specific omissions were proved relative to the real estate during 1945-1948; this merely indicates that where an omission occurred, it could be picked up by checking the records of rent collectors (S. R. O. R. 2, R. 104-105) or the tenants (R. 104).

On cross-examination, the Revenue Agents who made the net worth investigation did not attribute the net worth increases to taxable sources, or to any particular sources whatsoever; on the contrary, they stated their inability to explain, identify, or account for the net worth increases (R. 26-28). The principal Government witness testified that he did not know what the net worth increases were composed of (R. 26), except that they were unrelated to the specific omissions (R. 27). There was an absolute failure to prove taxable source.

Basic to the Government's refusal to confess error is the contention in its latest brief below (page 7) that a requirement of proof of a "definite" or "actual" source of the net worth increases "would do away with the net worth theory by making the Government prove specific items of

income." Despite the teaching of *Holland* (l. c. 137-138), the Government is insistent that net worth proof can be meaningful in itself, apart from proof of unreported income to account for the increase.

When the Government proves *specific* items of income, as in *Mitchell*, it does not need net worth proof to show the amount thereof, but can perhaps find use for the method if the net worth proof is sufficiently similar in amount to prove corroborative. *Olson* v. *United States*, C. A. 8, 191 F. 2d 985, 987. Where the Government proves unreported income in an indeterminate amount, as in *Holland* and *United States* v. *Johnson*, 319 U. S. 503, net worth proof is valuable in establishing the approximate amount thereof. The Government insists, however, on a grandiose role for net worth proof and refuses to concede that the net worth method does not prove income, but is merely a measuring device. In a tax evasion prosecution we contend there is no substitute for independent proof of unreported income, and we believe *Holland* establishes this principle. Until this basic concept is accepted by the Government and the lower courts, endless confusion will continue in net worth prosecutions, affecting hundreds of litigants.

In the evolution of the net worth method "from the final volley to the first shot in the Government's battle for revenue" (*Holland*, l. c. 126-127), the Government has become charmed and hypnotized by this measuring device, to the point where it belittles and scorns its obligation to prove unreported income. Another decision of this Court is apparently required to break the Government's fascination with the measuring device, and to replace it with a more fitting concentration on proof of what is being measured.

(b) *Relative to Instructions on Net Worth Proof.*

If, as petitioner contends, the net worth proof at trial was insufficient, instructions on the net worth proof were inappropriate; and the trial court, in applying the principles announced in *Holland,* should have withdrawn the net worth proof from jury consideration, either by instruction or, in view of the primary role of the net worth proof in this prosecution, by declaring a mistrial. Even assuming, contrary to the record here, that there was enough evidence of taxable source for jury consideration, then certainly the barest minimum of protection for petitioner's rights under the *Holland* principles would require instructions that the jury could not assume net worth increases to be attributable to currently taxable income unless the jury could determine that the net worth increases sprang from a taxable source or sources, as independently established by the evidence beyond a reasonable doubt. 348 U. S. 121, 137-138. Assuming a record stronger than this for the Government on the question of source, such an instruction would be the most necessary relevant instruction applying the rule that "Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which its rests, and the inferences available both for and against the accused" (l. c. 129).

What we find in reviewing the instructions on net worth is a cryptic instruction tacitly contradicting the above. Aside from making a net worth calculation, which automatically treats net worth increase as income, without consideration of source, the court stated, "And I should say to you it is perfectly legitimate, that is legitimate proof, proper proof for the Government to undertake to compute the income tax on the income of an individual

from year to year by taking the net worth from year to year" (R. 71). This instruction had the effect of *removing* from jury consideration the question of source of the net worth increases and placing the stamp of legitimacy on a calculation of purported income which disregards the source of the assets. The "great danger" seen by this Court (l. c. 127-128) "that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows" was fully borne out under these instructions. It is a practical certainty that the jury, like the court, accepted this theory of "guilt by subtraction."

No more basic defect in instructions, and failure to follow *Holland,* can be conceived.

(3) *Baseless Procedural Objections*—Questions (4) and (5).

The vital issue heretofore discussed relative to the trial of this case concerns a single subject, the source of the net worth increases, and subdivides into issues relative to the burden of proving source and the charge to the jury on said subject. No objections were made by petitioner at trial; but procedural objections to review based on failure to object at trial are peculiarly inappropriate at this stage, in light of the action of this Court in *Mitchell* v. *United States,* 348 U. S. 905 (See Topic (1), *supra.*) Nevertheless, and despite the Government's initial failure to raise this point in opposition to consideration of the sufficiency of the net worth proof (see Appellee's Statement, Brief and Argument, Point II, filed in Court of Appeals, October 5, 1953), the procedural objections raised *sua sponte* are the sole subjects discussed in the opinions of the Court of Appeals relative to net worth (R. 122, Appendix, pp. 22-25). These objections, if examined, are wholly without merit.

Before considering the change of law resulting from *Holland* v. *United States,* 348 U. S. 121, which requires fresh consideration of matters which trial counsel were not obligated to anticipate, general considerations indicating the necessity for appellate review, notwithstanding failure to object at trial, will be briefly noted as follows: (1) A failure of proof is such basic error that when discovered it requires reversal, in disregard of procedural objections. *Wiborg* v. *United States,* 163 U. S. 632; *Clyatt* v. *United States,* 197 U. S. 207; *United States* v. *Norton* (C. A. 2), 179 F. 2d 527; *United States* v. *Renee Ice Cream Co.,* (C. A. 3), 160 F. 2d 353; *Strickland* v. *United States* (C. A. 5), 155 F. 2d 167. (2) Defective instructions on vital issues should be considered, in disregard of procedural objections. *Danaher* v. *United States* (C. A. 8), 39 F. 2d 325, 331; *Stassi* v. *United States* (C. A. 8), 50 F. 2d 526, 531; *United States* v. *Ward* (C. A. 3), 168 F. 2d 226, 228; *United States* v. *Ausmeier* (C. A. 2), 152 F. 2d 349, 357; *Schino* v. *United States* (C. A. 9), 209 F. 2d 67, 75. (3) Failure to establish the primary theory of prosecution (S. R. O. R. 2, 8) requires reversal despite the possibility that the jury might have convicted if they had been limited to other grounds. *Terminiello* v. *City of Chicago,* 337 U. S. 1, 5; *Bollenbach* v. *United States,* 326 U. S. 607, 614; *Bihn* v. *United States,* 328 U. S. 633, 638-639; *Kotteakos* v. *United States,* 328 U. S. 750, 765; *Shelton* v. *United States* (C. A. D. C.), 165 F. 2d 241, 244-245. These authorities conflict with, and override, the erroneous statements by the Court of Appeals in the case at bar that a failure of proof "cannot for the first time" be urged on appeal (R. 127, Appendix, pp. 22-25); that "we are not at liberty to review" instructions unless objected to below (Appendix, p. 25); and, as justification for ignoring the failure to prove the net worth method, that "the evidence

of specific omitted income abundantly sustained the verdict" (Appendix, p. 23). If these statements are permitted to stand, attorneys in the Eighth Circuit would do well to forget the cautious construction which this Court has given to the "harmless error" doctrine, in the above decisions, and should delete Rule 52(b) from their copies of the Federal Rules of Criminal Procedure.

If the procedural objections raised by the Court of Appeals *sua sponte* in its original opinion (R. 122) are surprising, the refusal of the court to follow the direction of this Court and consider the new law announced in *Holland* is amazing. Even in civil cases, where a decision has less important effect than when liberty is at issue, the Court of Appeals for the Eighth Circuit has given effect to a change of law, or new constructions of the law, intervening between trial and review. *Trapp* v. *Metropolitan Life Ins. Co.*, 70 F. 2d 976, 980-981; *Helvering* v. *Hormel*, 111 F. 2d 1. Counsel are not at fault in failing to anticipate a change of law; and even if anticipated, their clients should not be penalized for failure to go through the useless motions of objecting against then-existing rules. They are "not required to do a palpably vain thing." *Thomas* v. *District of Columbia* (C. A. D. C.), 90 F. 2d 424, 428. Objections to errors are necessary "if they are of a character which might have been obviated." *Houghton* v. *Jones*, 68 U. S. 702. The Court of Appeals was clearly wrong, even without the direction of this Court, when it refused to consider "judicial interpretations of existing law after decision below * * * interpretations which if applied might have materially altered the result * * *" *Hormel* v. *Helvering*, 312 U. S. 552, 558-559.

The change of law effected in the Eighth Circuit by *Holland*, relative to the burden of producing evidence of source in a net worth prosecution, is equally clear. The

plainest statement of pre-existing Eighth Circuit law is found in *United States* v. *Caserta* (C. A. 3), 199 F. 2d 905, 907, where the court stated, relying on the Eighth Circuit case of *Schuermann* v. *United States,* 174 F. 2d 397, that "When the discrepancy between increased net worth and reported income is shown, the burden of explanation shifts to the taxpayer * * *" Compare *United States* v. *Hornstein* (C. A. 7), 176 F. 2d 217, 220, stating, "evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income." Eighth Circuit cases having like effect, in addition to the *Schuermann* case, *supra,* are *Hanson* v. *United States,* 186 F. 2d 61, 67, and *Banks* v. *United States,* 204 F. 2d 666, 668-669, holding that net worth calculations, standing alone, create a submissible case, and thereby placing the burden of explaining source on the defendant.

At trial below, all parties and the court relied upon said former law, now changed by *Holland.* The Government attorney stated to the jury that increased assets "would normally represent income" (R. 5), that "expenditures, also, would normally amount to evidence of income received during that year" (S. R. O. R. 1), and that increased assets "would naturally reflect the income received since it is only, unless otherwise explained, by income received that you will have increase in the net worth of the defendant" (S. R. O. R. 8). The court's instructions treated net worth increase as synonomous with income (R. 71). Objection below to this instruction, citing the failure to state the qualification relating to "explanation" mentioned by the Government attorney, would hardly have been helpful to petitioner, under said pre-existing law, since correction would merely have emphasized petitioner's failure to explain the net worth increase for 1945-1948,

a burden which this Court has now ruled rests on the Government. *Holland,* l. c. 137-138.

On the original appeal, petitioner raised the issue of the Government's failure to prove taxable source in the first court which could have altered the law (Appellant's Brief, 38, 39); and the Government then countered that affirmance could rest on the settled rule laid down in *Schuermann, supra.* (Appellee's Brief, 15, 22.)

The Court of Appeals for the Third Circuit has recognized that *Holland* shifts back to the Government the burden of proving net worth increases as taxable income, thereby superseding the rule stated in *Caserta, supra,* drawn from *Schuermann, supra. United States* v. *Adonis,* 221 F. 2d 717, 718-719. Once this is recognized, procedural objections to the failure to anticipate new law must be withdrawn. The continued reliance by the Court of Appeals on procedural objections must stem, therefore, from a failure to understand and apply the principles of *Holland,* or from a refusal to apply long-settled and unquestioned procedural doctrines.

(4) *Failure to Instruct on Section* 3616(a)—Question (6), *supra.*

As in *Dillon* v. *United States,* 218 F. 2d 97, certiorari granted April 25, 1955 (No. 629, O. T. 1954), there was no charge to the jury in this case authorizing an alternative conviction under Section 3616(a), Internal Revenue Code of 1939, which provides a lesser penalty than is authorized under Section 145(b) of said Code.

The only reason for not granting certiorari to review said point is counsel's failure to raise the issue heretofore. In light of the ruling of the Court of Appeals in *Dillon,* however, earlier presentation of the issue would

have been vain; and counsel's omission should not work an estoppel because it has had no adverse effect.

(5) *Misleading Market Values*—Questions (7) and (8), *supra.*

"Bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Holland,* l. c. 128. In a net worth prosecution, it is elementary that all valuations must be on a cost basis, as mentioned by this Court in *Holland* (l. c. 132); if market values are used, the possibility is created that increased market values during the prosecution period, on property retained and not subject to the capital gains tax, will be erroneously treated as income, and that conviction will be predicated on a failure to report as income unrealized appreciations in value which are not income.

In the instant prosecution just such an error occurred, despite repeated objections from petitioner. Financial statements containing more than $150,000 in increased market values were erroneously admitted in evidence, and the trial court erroneously used said financial statements to calculate unreported income, erroneously treating said $150,000 appreciation as income (R. 9, 11-14, 29-41, 63, 71-72, 121). Further, the court emphasized said evidence by stating that it should be considered as evidence of willful evasion (R. 72). The point here discussed, constituting flagrant, highly prejudicial error, twice objected to at the trial, is more fully covered in the petition for certiorari in *Mitchell* v. *United States* (No. 622, O. T. 1953, pages 6-8, 16-19), adopted herein by reference.

(6) *Additional Errors At Trial*—Question (9) *supra.*

The following errors, not objected to at trial, are subject to review under Rule 52(b), Federal Rules of Crimi-

nal Procedure. Petitioner doubts that in themselves they individually constitute grounds for granting this writ, but presents them because they are serious errors which should be reviewed if certiorari is granted.

Supplementing briefly the matters presented in the petition in No. 622, O. T. 1953, relative to the indirect references to defendant's failure to testify (R. 61, 62), note should be taken of the recent decision, *Benham* v. *United States* (C. A. 5), 215 F. 2d 472, where judgment was reversed when there was a statement to the jury, made without objection, as follows (l. c. 474):

> "The defendant is seeking, as is not unusual, to lay off his guilt here on women folks—these three women who took the stand—or dead people. He doesn't have the courage to come up before you and say, 'Yes, I did it.'"

Clear conflict of authority is created, when said decision is compared with the decision in this case, totally disregarding the following argument (R. 62):

> "I felt sorry for Mrs. Mitchell when she was on the stand the other day * * * Here is a lawsuit where a man tries to save his own bacon by hiding behind the skirts of his own dear, little wife."

Supplementing prior discussion of the trial court's erroneous designation of Mrs. Mitchell's testimony as legally "negative" and thereby "weak" (R. 73), which the Government commendably conceded in its first Brief in Opposition (No. 622, O. T. 1953), should probably not have been given (l. c. 19); the Court of Appeals for the Eighth Circuit has recently reversed a civil judgment (*Allis Chalmers Mfg. Co.* v. *Wichman*, 220 F. 2d 426), because the trial judge (who sat in this case) misapplied

the negative evidence rule in the same manner as at trial, in stating (l. c. 431):

> "Under the law, a witness who testified to the affirmative of a proposition is ordinarily entitled to be preferred to one who testifies to a negative * * * (the) testimony amounts to a negative, that is they did not see them * * *"

The language of the Court of Appeals (l. c. 431), "There was no basis to impose any starting, artificial weight-handicap upon their testimony as a matter of law * * *" should apply with added force in a criminal case.

The objections to additional argument contained at pages 27-29 of the petition for certiorari in No. 622, O. T. 1953, are adopted by reference without repetition.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
HARLOW B. KING,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

June, 1955.

Appendix.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

David H. Mitchell, Appellant, vs. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Missouri.

[May 3, 1955.]

Howard F. Sachs (Phineas Rosenberg, Harlow B. King and Morelock, Hoskins & King were with him on the brief), for Appellant.

Joseph L. Flynn, Assistant United States Attorney (Edward L. Scheufler, United States Attorney, was with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and WOODROUGH and THOMAS, Circuit Judges.

GARDNER, Chief Judge.

This case is before us for the second time pursuant to a judgment of the United States Supreme Court which vacated the judgment of this Court and remanded it "for consideration in the light of *Holland* v. *United States*,

Friedberg v. *United States, Smith* v. *United States,* and *United States* v. *Calderon,* decided by this Court December 6, 1954. We have not considered the merits of these cases, nor have we determined their relationship to our recent opinions, *supra,* believing that re-examination by the Courts of Appeal is desirable even in those cases remotely involving the principles laid down in the net worth decisions."

The case has accordingly been reargued and resubmitted. The basic issues are outlined in our prior opinion reported as *Mitchell* v. *United States,* 8 Cir., 208 F. 2d 854. They have not been changed by the judgment of the Supreme Court vacating our decision but the case has been remanded for re-examination because it as tried in the District Court "remotely" involved proof of net income by resort to the so-called net worth theory.

Although defendant interposed no motion for acquittal at the close of all the evidence and saved no exceptions to the instructions as given by the court, he nevertheless on this re-examination urges that the evidence was insufficient to sustain the verdict and that the court committed error in certain of its instructions, and in effect now seeks to retry his case *de novo* in this Court. Thus he contends that:

"1. In income tax prosecution based on net worth theory, there was failure of proof when the Government failed to present evidence that alleged increase in assets was attributable to taxable income rather than nontaxable sources, in that the Government failed to prove a likely taxable source from which the jury could reasonably find that the alleged net worth increases sprang; and under current authorities there was error in submitting such deficient evidence to the jury.

"2. In income tax prosecution based on net worth theory, where alleged net worth increases were evidenced

by the Government's net worth statement based on cost of assets, the trial court erred in admitting into evidence over objection appellant's financial statements based on market values which greatly exceeded cost as an alleged admission supporting said net worth proof; and the trial court further erred in instructions using said market value financial statements as alleged proof of net income under the net worth method.

"3. Under current authorities, the trial court erred in instructions in relation to the net worth method of proving income, in that it did not present a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available for the accused."

As has been observed there was no motion for acquittal interposed by defendant at the close of all the testimony. Only by the interposition of such a motion is the question of the sufficiency of the evidence to sustain a verdict made a question of law reviewable by this Court. *Leeby* v. *United States*, 8 Cir., 192 F. 2d 331; *Meier & Pohlmann Furniture Co.* v. *Troeger*, 8 Cir., 195 F. 2d 193; *Mitchell* v. *United States*, 8 Cir., 208 F. 2d 854. We must therefore again decline to consider the question of the sufficiency of the evidence to sustain the verdict further than to observe in passing that quite aside from the evidence as to taxable income for the years in question evidenced by resort to the so-called net worth theory of computation there was direct evidence of specific omitted income in the following amounts: 1945—$14,859.96; 1946—$5,485.00; 1947—$9,217.52; 1948—$3,484.00.

Viewing the evidence in a light most favorable to the government, as we must, the evidence of specific omitted income abundantly sustained the verdict. The theory of the defense in the trial court was not that there was not omitted taxable income but that its omission was attributable to bookkeeping errors or to a failure of defendant to consider the money as income.

Defendant, as in his first argument of this case, again urges that the court erred in admitting certain financial statements made by him to a bank as a basis for credit. The argument is simply a repetition of the argument submitted on the first hearing of this case. *Mitchell* v. *United States, supra.* We answer it by reaffirming what we there said as follows:

"These exhibits purported to represent the value of defendant's property at the time they were made. They were admissions as to his financial standing and corroborative of the testimony already introduced by the government in support of its net worth theory, which is not here challenged. It is urged that these statements may have included increases in value which could not properly be considered as income. It is observed, however, that the value of the real estate so far as disclosed by the statements shows no increase in value and there was no evidence that the statements included any increase in value as distinguished from income. Proof of defendant's income based upon the net worth theory had already been established by evidence to which no objection is here urged. That evidence alone was substantial evidence sustaining the allegations in the counts of the indictment here involved. In addition to this evidence there was, as has been pointed out, competent evidence of cash income received by defendant in each of the years involved and not reported by him in his income tax returns. It was not incumbent upon the government to prove with exactness nor precision the amount of defendant's taxable income, but as the trial court charged it was only necessary to prove that there was a failure to make a return of the income earned, whatever the amount. *Leeby* v. *U. S.*, 8 Cir., 192 F. 2d 331; *Rollinger* v. *U. S.*, 8 Cir., 208 F. 2d 109.

* * * * * * *

As these was abundant competent proof aside from these questioned exhibits that defendant omitted from the reported income substantial amounts the admission of these exhibits could not be prejudicial."

The exhibits were admissions showing knowledge of the increase over and above reported income.

It remains to consider the contention that the court erred in certain of its instructions. The instructions were not objected to and counsel for defendant affirmatively approved them. In these circumstances we are not at liberty to review them. *Finnegan* v. *U. S.*, 8 Cir., 204 F. 2d 105; *Mitchell* v. *United States, supra.*

A re-examination of the entire record and the contentions urged by defendant for reversal convinces us that neither in the trial of this case by the District Court nor on the appeal in this Court was any violence done to the precautionary teaching or principles announced in *Holland* v. *U. S.*, 348 U. S. 121, and companion cases. The judgment appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court appealed from in this cause be, and the same is, hereby affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, David H. Mitchell, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence im-

posed upon him, within thirty days from and after t
date of the filing of the Mandate of this Court in the
District Court.

May 3, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 179

DAVID H. MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PREVIOUS OPINIONS

The original opinion of the Court of Appeals (R. 122-129) affirming the judgment of the District Court is reported at 208 F. 2d 854. The *per curiam* order of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in the light of the net worth cases decided December 6, 1954,* is reported at 348 U. S.

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* *Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.

905. The opinion of the Court of Appeals reaffirming the judgment of the District Court (Pet. 21-25) is reported at 221 F. 2d 554.

JURISDICTION

The second judgment of the Court of Appeals was entered May 3, 1955 (Pet. 25). A timely petition for rehearing was denied on May 31, 1955. The petition for a writ of certiorari was filed on June 24, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence, when considered in the light of the net worth decisions, was sufficient to support the verdict.

2. Whether, in the context of this case, the instructions of the trial court on the net worth features of the proof constituted plain error.

3. Whether the trial court erred in failing to instruct the jury on the alternative of conviction of a lesser offense under Section 3616(a) of the Code, where no request for such an instruction was made at the trial.

4. Whether the trial court erred in permitting the jury to consider three financial statements prepared by the petitioner in 1949 and 1950 in which some of the assets were valued at market instead of cost.

5. Whether there were other errors at the trial of such importance as to require the court below to exercise its discretion to notice plain error in the absence of a trial objection.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Reference is made to the Government's prior brief in opposition in this case (No. 622, October Term, 1953) for a detailed statement of the facts involved, with record references. In brief, the evidence demonstrated that, during the years involved in this case, the petitioner owned or acquired interests in a number of taverns and bars; that he leased to operators these businesses under agreements whereby he received either 20 per cent or 10 per cent of the gross receipts plus $50 a week rental; that he owned or acquired large interests in real estate, equities in several oil wells, and a small amount of stocks and bonds; and that he reported gambling winnings for one year.

The Government employed the net worth-expenditures method of proof to determine petitioner's correct net income. There was no dispute as to his net worth at the starting point, December 31, 1944, for he stipulated that it was $146,924.41. The net worth computation revealed the following as to petitioner's net income:

Year	*Reported*	*Corrected*	*Unreported*
1945	$18,297.52	$59,937.67	$41,640.15
1946	44,836.04	64,343.44	19,507.40
1947	22,716.92	64,716.40	41,999.48
1948	43,615.47	65,778.37	22,162.90
1949	44,139.16	61,132.73	16,993.57
1950	42,954.37	68,817.05	25,862.68

The inadequacy of the petitioner's books and records made it difficult to trace the exact source of the petitioner's income. Indeed, the record demon-

strates that, for the years involved, the petitioner had purchased over a thousand cashier's checks in amounts varying from $10 to $40,000, and had kept his money in thirteen separate bank accounts, many of which were not in his name, but which he admitted to be his funds.

In addition to the net worth computation, the Government proved substantial, specific items of taxable income which had been received by petitioner but not reported in his returns. The omitted items included $50 weekly rent payments received from petitioner's tavern operators and rentals received from certain other properties. The totals of the specific unreported items are as follows:

1945	$14,859.96
1946	5,485.00
1947	9,217.52
1948	3,484.00

Notwithstanding the indicated annual increases shown by the Government's net worth-expenditures method of proof, the defense never suggested that prior accumulation of cash, loans, gifts or inheritances might account for these increases. Rather, the defense attempted to show that the unreported income was the unintended result of petitioner's inadequate bookkeeping system. However, the defense did try to meet the Government's direct proof by denying receipt of some of the specific items and attempting to explain the failure to report others.

The sufficiency of the Government's case was not challenged by a motion for a judgment of acquittal, either at the close of the Government's case or at the close of all the evidence.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the evidence, viewed in the light of the principles laid down by this Court last December in the four net worth decisions, was insufficient to support the jury's verdict of guilty for the years 1945, 1946, 1947 and 1948. In our original brief in opposition in this case (No. 622, October Term, 1953, pp. 11-15), we demonstrated that petitioner's challenge to the sufficiency of the evidence, which was made for the first time on appeal, was not well taken. The opinions in the four net worth cases do not impair the validity of the arguments made there. Quite apart from the proof of taxable income for the years in question based on the net worth evidence, which for reasons spelled out in our original brief in opposition we think meets the requirements of the net worth decisions, the Government relied on proof of receipt by petitioner of substantial, specific items of unreported income, which, as the court below held (Pet. 23) "abundantly sustained the verdict."

Petitioner attacks (Pet. 7-8) the decision below as failing to comport with the order of this Court remanding the case, in that the court below found it unnecessary to review at length the net worth

features of the case. But plainly the order did not call for a hypothetical discussion of questions not before the court on the record in this case. Petitioner's attack on the judgment below (Pet. 8, 13-17) as erroneously grounded on procedural objections is likewise without merit. In its first opinion (R. 129), the court below properly noted that it could consider plain error though not presented at the trial, and added that "while the question of the sufficiency of the evidence is not properly before this court we have carefully examined the entire record and are of the view that the guilt of the Defendant as charged in the four counts of the indictment on which he was convicted was established beyond a reasonable doubt by substantial competent evidence * * *." In its second opinion, the court below similarly concluded (Pet. 25), after a "reexamination of the entire record", that no violence had been "done to the precautionary teaching or principles announced in *Holland* v. *U. S.*, 348 U.S. 121, and companion cases."

2. Petitioner also complains of the trial court's instructions to the jury on the net worth features of the case (Pet. 12-13), to which no objection was made at the trial. This contention comes too late. Rule 30, Federal Rules of Criminal Procedure. At all events, the instructions adequately informed the jury of the elements of the offense charged. Inasmuch as substantial, specific items of unreported income were shown and the defense frankly admitted failure to report some of these and sought to explain petitioner's omissions as bookkeeping

errors (see our brief in opposition, No. 622, October Term, 1953, pp. 9-12), the charge dealt largely with the question of wilfulness. In the context of this case, the omission of the trial court to give more extended instructions on the net worth features of the proof, in the absence of any request therefor at the trial, would hardly constitute grounds for reversal.

3. Petitioner contends (Pet. 17-18) that the trial court erred in failing to charge the jury as to lesser included offenses under Rule 31(c) of the Federal Rules of Criminal Procedure. He argues that the jury should have been instructed that it could find him guilty of a misdemeanor under Section 3616(a), Internal Revenue Code of 1939, rather than of the felony of tax evasion charged in the indictment. This Court has granted certiorari in *Dillon* v. *United States,* No. 37, October Term, 1955, where a request for such an instruction in an income tax evasion case was refused. The point is not properly presented in this case, however, for here no such request was made. Rule 30, Federal Rules of Criminal Procedure.

4 and 5. Petitioner renews his contentions with respect to the admissibility of three financial statements he prepared in 1949 and 1950 (Pet. 18) and with respect to certain alleged errors at the trial (Pet. 18-19). The lack of substance in these contentions was sufficiently demonstrated in our original brief in opposition in this case (No. 622, Oct. Term, 1953), to which the Court is respectfully referred.

CONCLUSION

For the reasons stated in the Government's original brief in opposition as well as those appearing above, it is submitted that the decision of the court below is correct. No conflict of decisions is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
RICHARD B. BUHRMAN,
EUGENE EMERSON,
Attorneys.

JULY, 1955.

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No. 179.

IN THE

Supreme Court of the United States

October Term, 1955.

DAVID H. MITCHELL, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
620 R. A. Long Building,
Kansas City, Missouri,
HARLOW B. KING,
1009 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

R. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3080

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

January 10, 1955, this Court vacated judgment in this case, for reconsideration "in the light of *Holland* v. *United States*, 348 U. S. 121 * * *." *Mitchell* v. *United States*, 348 U. S. 905. Neither the Court of Appeals in its opinion (Pet. 21) nor the Government in its brief in opposition has complied with this direction.

The strikingly relevant portion of the net worth cases is contained in *Holland* (l. c. 137-138), relating to the Government's burden to prove the taxable source of net worth increases. This burden of proving source makes necessary certain instructions to the jury, also relevant to this case.

Even before *Holland* clarified the law nationally and threw a spotlight on the issue of taxable source, petitioner challenged the Government's proof on this point. In his original brief in the Court of Appeals, he stated (l. c. 38), "There is no evidence of a source of income to appellant which could account for such large-scale increases, and no proof to negative (non-taxable sources)." In his original petition for certiorari in No. 622, O. T. 1953, he stated (l. c. 5), "(The Government) offered no evidence relative to the source of the increases claimed by it * * *." Subsequently to *Holland*, in his brief in the Court of Appeals (l. c. 7-16), and in his petition for certiorari (l. c. 8-11), petitioner probed the record in support of these statements. With four opportunities to answer, the Government has failed to specify any theory as to taxable sources, or to cite from the record any proof of source for the unexplained net worth increases; nor has the Court of Appeals hazarded a statement on this subject.

In its brief in opposition in No. 622, O. T. 1953, the Government admitted (l. c. 9), "The Revenue Agent who had conducted the investigation stated that he did not know the source of the additional income shown by the net worth computation over and above (the) specific items (R. 26-27)." After four opportunities have passed, it is apparent that the Government knows no more concerning source than does its agent, and that the record contains no testimony from which a trier of fact could determine that the net worth increases came from a taxable source. In its latest brief the Government merely complains (l. c. 4) that it is "difficult to tract the exact source of the petitioner's income." It is essentially undisputed that the Government has failed to prove taxable source, and has thereby failed to satisfy the test stated in *Holland*.

The procedural smokescreen by which the Government seeks to cover its failure of proof, and the failure of the trial court to give instructions in compliance with the new rules established by *Holland*, was anticipated and answered in the petition (l. c. 13-17). What could not be anticipated was the Government's continuing refusal to discuss the merits, and to give practical application to the rules set forth in *Holland*.

In its brief the Government suggests (l. c. 6) that apart from the net worth case the verdict might be sustained by reason of the secondary theory of prosecution, based on specific items of alleged unreported income. The Court of Appeals likewise relied upon this supposed safety net (Pet. 23). The position is legally unsound, under the authorities cited in the petition for certiorari (l. c. 14, point (3)). Petitioner conceives that the Government and court below failed to consider that affirmance on a different *factual* ground, or speculation as to the result if the trier had been limited to a particular set of facts, would amount to substituting an appellate review for a properly guided trial by jury.

Relative to instructions, the Government again does not directly defend the net worth instructions actually given, which treated net worth increases as synonomous with income, without requiring a finding of taxable source. Because some specific omissions were conceded by petitioner's evidence, and were fully explained (in most cases to the satisfaction of the jury, as demonstrated by the acquittal for 1949 and 1950), certainly does not relieve the Government of its obligation to prove the large net worth increases for 1945-1948 were unreported income, and does not relieve the jury from finding taxable source.

Petitioner went beyond his legal obligation and produced evidence which explained the net worth figures for

1949 and 1950 as omitted income resulting from bookkeeping errors, which the jury found to be innocent. Because of a different bookkeeping system in the earlier years, the accountant was unable to make a similar computation and direct reconstruction of financial changes during 1945-1948 (R. 55, 47-50). It is significant that the jury acquitted for the years in which the net worth increases were explained by petitioner, and convicted petitioner for the years for which there was no explanatory testimony. This clearly shows that the jury mistakenly placed the burden on petitioner to explain the net worth increases, ignoring the presumption of innocence and the *Holland* rule that the Government must first prove taxable source, and thus unreported income for the years in question, before "the defendant remains quiet at his peril." (l. c. 138-139). The judgment stands as an existing violation of the *Holland* decision.

For reasons herein and heretofore stated, granting this petition for certiorari will permit reversal of a conviction obtained erroneously and without compliance with the rules announced by this Court, and will further permit the firm establishment of the *Holland* decision as the law of the land.

Respectfully submitted,

PHINEAS ROSENBERG,
HOWARD F. SACHS,
HARLOW B. KING,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

August, 1955.

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No. 179.

IN THE

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October Term, 1955.

DAVID H. MITCHELL, *Petitioner*,

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

PHINEAS ROSENBERG,
HOWARD F. SACHS,
620 R. A. Long Building,
Kansas City, Missouri,
HARLOW B. KING,
1009 Commerce Building,
Kansas City, Missouri,
Attorneys for Petitioner.

MORELOCK, HOSKINS & KING,
Of Counsel.

E. L. MENDENHALL, INC., 924 WYANDOTTE, KANSAS CITY, MO., HARRISON 3030

IN THE

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No. 179.

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58, and for the purpose of obtaining a rehearing of this Court's action, October 10, 1955, in denying his petition for a writ of certiorari, petitioner herewith presents additional grounds for granting a writ of certiorari, not previously presented in this proceeding, as follows:

(1) Submission of net worth case to jury, on presumption that net worth increases arose from taxable sources,

without proof establishing taxable sources, violated presumption of innocence and shifted burden of proof in violation of Due Process clause of Fifth Amendment.

(2) Cumulative errors at trial prevented fair trial and violated Due Process clause of Fifth Amendment.

(3) Failure of Court of Appeals to apply principles of law announced by this Court in *Holland* v. *United States*, 348 U. S. 121, constituted such unjustifiable discrimination as to violate Due Process clause of Fifth Amendment.

(4) A new decision by the Court of Appeals for the Ninth Circuit, supporting the ruling below, expressly recognizes conflict between appellate courts and inconsistency with this Court's decisions as to whether review is *discretionary* or *absolutely forbidden* relative to plain errors committed at trial which were not brought to the attention of the trial court.

(1) Presumption of Taxable Sources—Constitutional Considerations.

The factual and introductory legal contentions upon which this point is based are covered in the Statement and at pages 8-13 of the petition for certiorari. Summing them up, it is clear from this record that petitioner was convicted in an income tax prosecution primarily based on the net worth method, without a scintilla of proof as to the source or likely source of the net worth increases shown by the Government's evidence for the years for which petitioner was convicted, by a jury which was led to disregard the issue of source or likely source by Government argument and by instructions from the trial court which permitted and directed consideration and treatment of net worth increases as taxable income, in the absence of disproof by petitioner of their taxable nature. There can be

no question in the instant case but that the burden of proof as to source was improperly shifted to petitioner, a criminal defendant, and that the presumption of innocence as to said crucial matter was violated.

In the petition for certiorari no express reference was made to the Constitutional aspects of this denial of petitioner's rights, as it was considered unnecessary in such an appropriately brief presentation to delve so deeply into the nature of the error committed herein. Reference to the petition for certiorari in No. 622, O. T. 1953, at pages 13-14, and to pages 41-43 in his first brief in the Court of Appeals, indicates that petitioner has been fully aware of the Constitutional consideration, and that it is considerably more than an afterthought.

The shifting of the burden of proof and the arbitrary presumption of guilt upon which the prosecution rested its case violated petitioner's Constitutional rights, which this Court has ruled may not be tampered with by the Congress (*Tot* v. *United States*, 319 U. S. 463), or the courts (*Krulewitch* v. *United States*, 336 U. S. 440, 457; *Morissette* v. *United States*, 342 U. S. 246, 275).

(2) Cumulative Error—Constitutional Considerations.

The basic error relative to proof and presumptions regarding the source of net worth increases discussed above did not stand alone. Equally or more misleading with the jury was the Governmentally induced confusion of market with cost valuations, under which net worth increases obtained by comparing net worth statements prepared or admitted by the petitioner, and which actually showed more than $150,000 in unrealized market value increases, were erroneously treated by the trial court as devastating ad-

missions of unreported income (R. 9, 11-14, 29-41, 63, 71-72, 121). In addition thereto, prejudicial hearsay was permitted in cross-examination by the Government of its own witnesses, under a claim of surprise, disproved by the record (R. 16-20); the trial court erroneously charged the jury that petitioner's evidence was legally "negative" and thereby "weak" (R. 73); and the Government's argument went outside the record (R. 64), mis-stated a ruling by the trial court (R. 65), improperly dealt in personalities (R. 58, 60), impliedly referred to petitioner's failure to testify (R. 61, 62), and mistakenly stated that negligence of third parties is not a defense to charge of tax evasion (R. 65).

Without attempting at this time to develop in full each of the above matters, petitioner relies here on the cumulative effect of said errors, believing that "the combination of these * * * errors was sufficiently prejudicial to require reversal." *Gordon* v. *United States,* 344 U. S. 414, 422. While considering that certain of said errors alone were fatal to the fairness of the proceeding, and deprived the trial of the basic soundness of procedure guaranteed under the Fifth Amendment, certainly the accumulation of such errors prevented the achievement of Due Process. Compare *Buchalter* v. *New York,* 319 U. S. 427; *Stroble* v. *California,* 343 U. S. 181.

(3) Failure to Apply Holland—Constitutional Considerations.

The failure of the Court of Appeals to follow the directives of this Court and the new rules relative to proof and instructions in net worth cases, particularly respecting the *source* of net worth increases, are developed in the Statement and at pages 7-13 of the petition for certiorari. Under the rules of this Court, repetition of such argument would be improper and unnecessary, but understanding thereof is a necessary basis for the point herein made.

Whether considered as a refusal to apply general law, declared by this Court, to petitioner individually or a refusal by one appellate court to enforce law generally applicable throughout the country, it is contended that the Court of Appeals has created "discrimination * * * so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Compare *Boykin* v. *Huff*, C. A. D. C., 121 F. 2d 865, 872.

The only possible justification for discriminatory classification, and the failure to apply the principles established by *Holland*, would be procedural distinctions. Such distinctions were considered by petitioner at pages 13-17 of his petition, and were there disposed of.

Even if "doubts of a philosophical nature" may be conscientiously suppressed by refusing to apply subsequent judicial decisions to *closed* criminal cases (*Collins* v. *Webb*, U. S. D. C. Cal., 133 F. Supp. 877), under the decisions cited in the petition for certiorari (l. c. 15), and under the express direction of this Court that *Holland* should be applied to the instant case (*Mitchell* v. *United States*, 348 U. S. 905), the Court of Appeals' actual refusal to apply said principles is arbitrary and violative of due process; nor is the decision saved by that Court's polite reference to *Holland* (Petition 25). Petitioner cannot believe that this Court's vacation of judgment for reconsideration may be so lightly satisfied, when analysis unmistakably calls for a new trial.

(4) New Decision Requiring Consideration of Rule 52(b).

Rule 52(b), Federal Rules of Criminal Procedure, states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In the case at bar, however, the Court of Appeals denied that it had even a *discretionary* power to review the sufficiency of evidence or instructions

to the jury, in the absence of objection below (Petition 23, 25). Petitioner adopts without repetition herein his arguments and authorities contained at pages 13-15 of the petition, and relies herein on a new decision relevant thereto, which, in his opinion, requires the attention of this Court.

October 11, 1955, the Court of Appeals for the Ninth Circuit, brought to a climax the conflict within the appellate courts on this point. *Herzog* v. *United States*, C. C. H. Standard Federal Tax Reporter '55, vol. 5, #9694. Agreeing with, and citing a leading case from the Eighth Circuit which was also cited in the instant case, the author of the *Herzog* opinion stated that Rule 52(b) allows no discretion to appellate courts to review errors below, absent objections below. He ruled, "There is no distinction made for 'grave error,' 'fundamental error,' 'slight error' or any other kind of error. If there is a failure to except to an instruction the appellate courts are foreclosed from reviewing the question."

In so ruling, consistently with the Court of Appeals in this case, the panel of judges deciding *Herzog* recognized that their decision overruled *Bloch* v. *United States*, (C. A. 9) 221 F. 2d 786, and further held that the relevant points in the decisions of this Court, *Screws* v. *United States*, 325 U. S. 91, 107, and *United States* v. *Atkinson*, 297 U. S. 155, "have not been the law since the Federal Rules of Criminal Procedure became effective March 21, 1946."

The *Herzog* decision, other appellate decisions cited therein insofar as they support said decision, and the case at bar are clearly in error in denying the discretionary power contained in Rule 52(b). The decisions of this Court claimed to have been overthrown by the Federal Rules of Criminal Procedure still stand. The *Herzog* opinion failed to examine the Advisory Committee Notes relating to Rule

52(b) which state, "This rule is a restatement of existing law" citing *Wiborg* v. *United States*, 163 U. S. 632, 658, in which this Court held, with reference to a failure to object to error at trial, "although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

The issue is of the greatest importance in the administration of justice. It is whether Federal trial judges have a reviewable responsibility, independent of trial counsel, to prevent "plain error affecting substantial rights" of criminal defendants; whether, for instance, there are circumstances when "the trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck* v. *United States*, 318 U. S. 236, 248. *Herzog* and *Mitchell* directly contradicting this Court's ruling in *Wiborg*, *supra*, hold that appellate courts "are *not* at liberty" (Pet. 25) to review such errors, however plain, flagrant, and prejudicial. It will require a decision of this Court to restore meaning to Rule 52(b), to restore confidence in the above-cited decisions of this Court, and to prevent absolute foreclosure of defendants' rights because of claimed omissions by trial counsel.

In conclusion, we wish to inform the Court that the attorneys for defendant in *Herzog* advise that if their petition for rehearing *in banc* is denied by the Court of Appeals for the Ninth Circuit, they propose to petition for certiorari in this Court.

CONCLUSION.

For the reasons herein stated, and for the reasons previously set forth in this proceeding, petitioner respectfully urges the Court to grant a rehearing, vacate its denial of certiorari, and grant a writ of certiorari.

Respectfully submitted,

PHINEAS ROSENBERG,
HOWARD F. SACHS,
HARLOW B. KING,
Attorneys for Petitioner.

November, 1955.

CERTIFICATE OF COUNSEL.

The undersigned attorney for petitioner hereby certifies that the above petition for rehearing is presented in good faith and not for delay, and is restricted to substantial and controlling intervening circumstances and to substantial grounds available to petitioner although not previously presented, and to the examination of the same.

HOWARD F. SACHS,
Attorney for Petitioner.